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 16

PUBLIC VERSION

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

13 VERIGY US, INC, a Delaware Corporation
 14 Plaintiff,
 15 vs.
 16 ROMI OMAR MAYDER, an individual;
 17 WESLEY MAYDER, an individual; SILICON
 18 TEST SYSTEMS, INC., a California Corporation;
 19 and SILICON TEST SOLUTIONS, LLC, a
 20 California Limited Liability Corporation,
 21 inclusive,
 22 Defendants.

Case No. C07 04330 RMW (HRL)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
WESLEY MAYDER'S MOTION FOR
SUMMARY JUDGMENT**

Date: August 8, 2008
 Time: 9:00 am
 Ctrm.: 6
 Judge: Hon. Ronald M. Whyte

Complaint Filed: August 22, 2007
 Trial Date: None Set

22 AND RELATED CROSS ACTIONS

23
24 **DOCUMENT SUBMITTED UNDER SEAL**

25 **HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY**
26 **PURSUANT TO STIPULATED PROTECTIVE ORDER**

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1 Plaintiff, Verigy US, Inc. (“Verigy”) respectfully submits the following brief in opposition
 2 to the motion for summary judgment brought by defendant Wes Mayder.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION AND BACKGROUND**

5 This case involves the misappropriation of Verigy’s valuable trade secrets and confidential
 6 information by Romi Mayder a former Verigy employee, by the new companies he formed,
 7 Silicon Test Solutions, LLC (“STS LLC”) and Silicon Test Systems Inc. (“STS, Inc.”)
 8 (collectively, the “STS Entities”), and by Romi Mayder’s brother and co-conspirator, defendant
 9 Wes Mayder, who invested in both STS Entities, was a Member of STS LLC and a boardmember
 10 of STS, Inc.

11 Romi Mayder was a long-term and trusted employee of Verigy, and its predecessors-in-
 12 interest, Agilent Technologies, Inc. (“Agilent”) and Hewlett Packard Company (“HP”), who
 13 abruptly resigned his employment with Verigy in September 2006 and incorporated STS LLC on
 14 September 8, 2006, even prior to his resignation.

15 In early July 2007, Verigy learned that Romi Mayder was marketing a product very similar
 16 to Verigy’s products and began an investigation to determine whether Romi Mayder was using
 17 Verigy trade secrets. In late July, a former Agilent officer, Robert Pochowski, informed Verigy of
 18 his involvement with Romi Mayder, Wes Mayder and the STS entities. Pochowski provided
 19 certain documents, including emails, to Verigy in August 2007.

20 On August 22, 2007, after Verigy’s investigation revealed that Romi Mayder had
 21 misappropriated and was using Verigy’s trade secrets, Verigy filed this action and sought a
 22 temporary restraining order (“TRO”). The TRO was granted on August 24, 2007 and remained in
 23 force until replaced by a five (5) month preliminary injunction granted by this Court on February
 24 28, 2008. The preliminary injunction was extended for another four (4) months by subsequent
 25 order dated May 20, 2008 which found defendants in contempt of the TRO. Defendants have been
 26 preliminarily enjoined “from directly or indirectly marketing, distributing, selling, licensing,
 27 leasing, transferring or disposing of...Flash Enhancer, or any product developed with the use of,
 28

1 derived from, or incorporating all, or any part [of] Flash Enhancer.”¹

2 Presently, Wes Mayder has moved for summary judgment (and, in a separate concurrent
 3 motion, for sanctions pursuant to Fed.R.Civ.P. 11), contending that he has been improperly named
 4 in this lawsuit because he is merely a passive minority shareholder of STS, Inc. who has never had
 5 any operational role in his brother Romi Mayder’s companies. However, the evidence belies this
 6 contention. Contemporaneous documentary evidence indicates that Wes Mayder had an
 7 operational role in both STS Entities. Wes Mayder was, based on his own signature on the
 8 operating agreement, a “member” of STS LLC, and Wes Mayder was, based on Romi Mayder’s
 9 repeated contemporaneous admissions, a director of STS, Inc. Moreover, regardless of Wes
 10 Mayder’s *de jure* position in the hierarchy of the STS Entities, the documentary evidence indicates
 11 that Wes Mayder was a *de facto* co-conspirator with his brother in expropriating Verigys
 12 intellectual property for the brothers’ own private profit. Wes Mayder is and was anything but a
 13 “passive minority shareholder” as he proclaims himself to be. At the very least, there are
 14 genuinely disputed material issues of fact precluding summary judgment.

15 **II. STATEMENT OF ISSUES**

16 1. Is Wes Mayder entitled to summary judgment dismissing him as a defendant in this
 17 action? (*Correct answer: No.*)

18 2. Is Wes Mayder entitled to summary adjudication of any one or more of the claims
 19 for relief against him in this action? (*Correct answer: No.*)

20 **III. ARGUMENT**

21 Federal Rule of Civil Procedure (“Fed.R.Civ.P.”) 56 provides for summary judgment when
 22 “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the
 23 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
 24 party is entitled to judgment as a matter of law.”

25
 26 ¹ Order Granting In Part Plaintiff’s Motion For A Preliminary Injunction; Etc. (Docket No.
 27 171).
 28

1 “The moving party bears the initial burden of demonstrating the absence of a ‘genuine
 2 issue of material fact for trial.’” *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9th
 3 Cir. 2006), quoting, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

4 “(I)n ruling on a motion for summary judgment, the nonmoving party’s evidence ‘is to be
 5 believed, and all justifiable inferences are to be drawn in [(that party’s)] favor.’” *Miller*, 454 F.3d
 6 at 988, quoting, *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

7 **A. Wes Mayder is Not Entitled to Summary Judgment Because There are
 8 Genuinely Disputed Material Issues of Fact Concerning Wes Mayder’s
 9 Involvement as a Conspirator in the Theft of Verigy’s Intellectual Property.**

10 “A civil conspiracy occurs when the parties have reached ‘a unity of purpose or a common
 11 design and understanding, or a meeting of the minds in an unlawful arrangement.’” *Transgo, Inc.*
 12 *v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9th Cir. 1985), quoting *American Tobacco*
 13 *Co. v. United States*, 328 U.S. 781, 809-810 (1946). “A conspiracy must be looked at as a whole,
 14 and acts which are in themselves legal lose that character when they become constituent elements
 15 of an unlawful scheme.” *Transgo*, 768 F.2d at 1020-21.

16 “The existence of a civil conspiracy makes each participant in the wrongful act responsible
 17 as a joint tortfeasor for all damages resulting from the wrong, *whether or not a participant was a*
 18 *direct actor and regardless of the degree of his activity.*” *Klistoff v. Superior Court*, 157 Cal. App.
 19 4th 469, 479 (2007) (emphasis added). “By participation in a civil conspiracy, a coconspirator
 20 effectively adopts as his or her own the torts of other coconspirators within the ambit of the
 21 conspiracy.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510-11 (1994).

22 Here, as shown below, Wes Mayder was an active co-conspirator in his brother’s activities,
 23 regardless of his formal position in the STS Entities. And, as his brother’s co-conspirator, Wes
 24 Mayder is equally liable for Romi Mayder’s misconduct. *See, Transgo*, 768 F.2d at 1023 (As co-
 25 conspirators, the defendants were found to be joint tortfeasors, jointly and severally liable for all
 26 compensatory damages awarded . . .); *Klistoff*, 157 Cal. App. 4th at 479. At the very least, there
 27 are genuinely disputed material issues of fact whether Wes Mayder conspired with his brother in
 28 connection with the misuse of Verigy’s intellectual property, thereby precluding summary
 judgment.

1 **1. Wes Mayder Agreed to Become a Member of STS, LLC.**

2 Wes Mayder contends in his summary judgment motion that “[h]e is not involved in his
 3 brother’s business, has no background at all in the semiconductor industry . . . has no ownership
 4 interest in defendant STS LLC, nor has he *ever* . . . had an ownership interest therein.” (Motion, at
 5 pp. 2-3) (emphasis added). These assertions are *not* supported by Wes Mayder’s sworn
 6 declaration (which is highly misleading and which Wes Mayder, in material respects, disavowed
 7 at his deposition.) Further, the assertions are belied by documentary evidence proving that, *in fact*,
 8 Wes Mayder *was* involved with his brother in the semiconductor industry and *did* have an
 9 ownership interest in his brother’s business.

10 Wes Mayder, along with his brother Romi Mayder, signed the operating agreement in STS
 11 LLC, made as of October 11, 2006, which designates Wes Mayder as a “Member” of the LLC,
 12 with a 20 percent ownership stake in such limited liability company based on a \$250,000 capital
 13 contribution. (*See*, Pochowski Decl., ¶ 6 and Ex. A; *see also*, Gagliardi Decl., ¶ 2 and Ex. A (Wes
 14 Mayder Depo.Tr., at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91) (copy of
 15 STS LLC Operating Agreement signed by Wes Mayder)). Although the Operating Agreement
 16 was never signed by Pochowski, the document is nevertheless admissible evidence that the
 17 Mayder brothers, each of whom *did sign* it, were engaged in a joint enterprise involving
 18 semiconductor device testing, STS LLC. On its face, the document evinces “*the intent of each*
 19 *Member . . . to actively engage in the management*” of the enterprise’s business, “*Semiconductor*
 20 *Device Testing.*” (Pochowski Decl., Ex. A, ¶ 4.1; Wes Mayder Depo.Tr., Ex. 91, ¶ 4.1) (emphasis
 21 added).

22 As mentioned, Wes Mayder *affixed his signature* to this document.² “The existence
 23 of an LLC begins upon the fling of articles of incorporation by the Secretary of State. . . To validly

25 2 Confronted at his deposition with his signature on the STS LLC Operating Agreement,
 26 Wes Mayder testified he did not recall signing it but admitted that the signature looked “similar”
 27 to his own, and he could not deny that it was, in fact, his. (Gagliardi Decl., ¶ 2 and Ex. A (Wes
 28 Mayder Depo.Tr. at 46:12 – 47:23; 50:1-10; 51:18 – 52:2; 211:11 – 214:3 and Ex. 91). Wes
 Mayder also testified that he was *retracting* parts of sworn declaration in which he denied signing
 the STS LLC Operating Agreement. (*Id.*, at 52:12 – 54:11).

1 complete the formation of an LLC, the members must enter into an operating agreement either
 2 before or after filing the articles. But the *operating agreement need not be in writing*; indeed it
 3 may consist of no more than an oral agreement among the initial members to organize the limited
 4 liability company!” 1 Friedman, *California Practice Guide: Corporations*, ¶¶ 2:36:30 & 2:36:32
 5 (2007), at p.2-17, *citing* Cal. Corps. Code §§ 17001(b) & 17050(a) (emphasis added). Here, by
 6 signing the written operating agreement both Romi Mayder and Wes Mayder evinced their intent
 7 to, and did, complete the formation the STS LLC, of which they were *both* members.

8 Moreover, even if *arguendo* the STS LLC entity was never *legally* consummated in the
 9 absence of Pochowski’s signature on the Operating Agreement, Wes Mayder’s signature on the
 10 document evidences *factually* the brothers’ conspiracy to operate a company engaged in the
 11 semiconductor device testing industry – using Verigy’s technology. Wes Mayder’s signature on
 12 the Operating Agreement is written contemporaneous evidence of his agreement to join his brother
 13 Romi Mayder’s illicit enterprise. It is evidence of his participation in an unlawful conspiracy and
 14 thereby exposes him to joint and several liability for his brother’s actions in furtherance of the
 15 conspiracy. This is true whether or not Wes Mayder was a direct actor and regardless of the
 16 degree of his activity (or whether he knew anything about the semiconductor device testing
 17 industry). *Klistoff*, 157 Cal. App. 4th at 479.

18 Wes Mayder’s conspiracy is further evidenced by a letter from the brothers’ corporate
 19 attorney, Daniel E. Hanley, to Pochowski, dated December 13, 2006:

20 Dear Mr. Pochowski:

21 We are attorneys for Silicon Test Solutions, LLC (STS).

22 When *we formed STS on September 8, 2006*, we were advised by Romi Mayder
 23 that the members would be Romi, *Romi’s brother Wesley* and yourself. . . .

24 On that basis, we prepared the Operating Agreement, which details the ownership
 25 interest in STS. . . .

26 Neither Romi *or his brother* care to act as co-owner with you. On behalf of the
 27 Mayders their offer to you to be a member of STS is hereby terminated. . . .

28 Very truly yours,

[signature]
 Daniel E. Hanley

1 (See, Pochowski Decl., ¶ 9 and Ex. D (emphasis added)). This letter makes amply clear that the
 2 joint enterprise in which both Romi and Wes Mayder were each involved would proceed even
 3 without Pochowski. Likewise, Romi Mayder characterized his brother [REDACTED]
 4 [REDACTED] (Gagliardi Decl., ¶ 2
 5 and Ex. A (Wes Mayder Depo.Tr. at 40:20 – 41:13; 42:18 – 43:21 and Ex. 90)). Further, Wes
 6 Mayder admitted at deposition that he made a \$250,000 capital contribution to STS LLC to secure
 7 his ownership stake in STS LLC. (*Id.*, at 31:14 – 38:21; 83:20 – 86:7 and Ex. 94)).

8 Any contention that Wes Mayder never held an ownership stake in STS LLC is simply and
 9 demonstrably false. At the very least, the evidence raises a genuine dispute of material fact as to
 10 Wes Mayder's involvement in the management of STS LLC and whether he agreed to join in a
 11 conspiracy with his brother to illegally profit from the use of Verigy's technology.

12 **2. Wes Mayder Is, or Was at Relevant Times, a Director of STS, Inc.**

13 Wes Mayder also contends that he has “no board position, no officership, no employee
 14 standing, and no operating role whatsoever” in STS, Inc. (Motion, at p.3, *citing*, Wes Mayder
 15 Decl., ¶¶ 12-13). However, these contentions are also contradicted by documentary evidence
 16 produced by defendants in this action.

17 In an email string on July 3, 2007, which Wes Mayder authenticated at his deposition,
 18 [REDACTED]
 19 [REDACTED] (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 124:20
 20 – 127:8 and Ex. 100.) Wes Mayder was copied on the email. (*Id.*) Similarly, in an email string
 21 on July 9, 2007, Romi Mayder wrote to Wes Mayder and Francois, stating: [REDACTED]
 22 [REDACTED]
 23 [REDACTED] (*Id.*, Wes Mayder Depo.Tr. at 142:2 – 143:23 and Ex. 102) (emphasis added).) Wes
 24 Mayder received the email string and responded to it. (*Id.*)³ Accordingly, there are at least
 25

26 ³ Defendants also deny that Francois was ever a member of STS, Inc.'s board of directors,
 27 but Romi Mayder told him otherwise. (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at
 28 124:20 – 127:8; 142:2 – 143:23 and Exs. 110 & 102).) Further, it would appear Francois believed
 him, because, as of July 8, 2008, Francois was touting himself on the internet as a “founding
 Director of Silicon Test Systems in San Jose, CA.” (*Id.*, Ex. 110).

1 genuinely disputed issues of material fact whether Wes Mayder was or is as a member of the
 2 board of directors of STS, Inc.

3 As a director of STS, Inc., Wes Mayder is subject to liability based on his investment in
 4 and control of the company if he knew or had reason to know of misappropriation of a
 5 competitor's trade secrets. "A corporate director or officer's participation in tortious conduct may
 6 be shown not solely by direct action but also by knowing consent to or approval of unlawful acts."
 7 *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1380 (2000). "To maintain a tort claim against a
 8 director in his or her personal capacity, a plaintiff must first show that the director specifically
 9 authorized, directed or participated in the allegedly tortious conduct (citation); *or that although*
 10 *they specifically knew or reasonably should have known* that some hazardous condition or activity
 11 under their control could injure plaintiff, *they negligently failed to take or order appropriate*
 12 *action to avoid the harm* (citations)." *Id.*, quoting, *Frances T. v. Village Green Owners Assn.*, 42
 13 Cal.3d 490, 508-09 (1986) (emphasis by *Kadisha* court).

14 Here, Wes Mayder, as a director of STS, Inc., either knew or reasonably should have
 15 known – before the lawsuit was filed in late August 2007 – that STS, Inc. was born of his
 16 brother's duplicity in taking technology from Verigty. In early July 2007, counsel for Verigty sent
 17 a pair of letters to Romi Mayder raising effectively the same allegations made in this lawsuit
 18 which were immediately forwarded to Wes Mayder (but notably *not* to other minority
 19 shareholders, an action in itself suggesting that Wes Mayder was more than merely a passive
 20 investor, but instead his brother's co-conspirator). (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder
 21 Depo. Tr. at 132:12 – 136:8; 170:2 – 175:6 and Exs. 101 & 104).) Upon receiving these direct
 22 allegations of wrongdoing, Wes Mayder failed to take or order appropriate action and admitted at
 23 his deposition that he performed no investigation whatsoever into the allegations other than to ask
 24 his brother's opinion of them. (*Id.*) Wes Mayder further admitted that he accepted "on faith"
 25 everything his brother told him, notwithstanding that his brother frequently told him things which
 26 were false. (*Id.*, at 175-1-6.) Such "head-in-the-sand" behavior was negligent, objectively
 27 unreasonable and precisely the sort of behavior rendering him liable for the misdeeds of the
 28 company under the doctrine enunciated in *Kadisha*. Accordingly, summary judgment absolving

1 him from any potential liability is inappropriate.

2 **3. Wes Mayder Was Not Merely a Passive Minority Shareholder but
3 Instead an Active Co-Conspirator with his Brother Romi Mayder.**

4 Wes Mayder argues repeatedly that he was “solely a passive, minority shareholder” in
5 Romi Mayder’s company, STS, Inc. (Motion, at p.1; *see also id.*, at pp.2, 8, 9, 10 & 11; Wes
6 Mayder Decl., ¶ 7 (“I am only a passive shareholder”)). However, this assertion is nonsense,
7 belied by Wes Mayder’s own admissions about his active role in the operations of company (and
8 its predecessor STS LLC), whether or not he was formally a member of STS, Inc.’s board of
9 directors.

10 **a. Wes Mayder Solicited Investors for STS, Inc.**

11 Wes Mayder, based on his own deposition testimony, was actively involved in the effort to
12 secure investors for STS, Inc. [REDACTED] (Gagliardi
13 Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 56:11 – 59:10 and Ex. 92).) [REDACTED]
14 [REDACTED] (*Id.*, at 65:11 – 70:12 and Ex. 93) [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] (Gagliardi Decl., ¶¶ 2-3 and Ex.
21 A (Wes Mayder Depo.Tr. at 59:11 – 60:2) and Ex. B (Davidson Depo.Tr. at 70:4 – 71:8).) Fund-
22 raising for a start-up company is not the domain of a merely passive investor.

23 **b. Wes Mayder Used His Driver’s License for a Seller’s Permit for
24 STS, Inc.**

25 Wes Mayder, by his own admission at deposition, was also actively involved in [REDACTED]
26 [REDACTED].
27 (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 118:11 – 124:18 and Exs. 97-99).) On
28 March 29, 2007, Romi Mayder emailed his brother, [REDACTED]

1 [REDACTED]
 2 [REDACTED] (*Id.*, ex. 97). Later the same day, Romi Mayder emailed back
 3 indicating that [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED] (*Id.*, ex. 98). Romi Mayder then emailed
 7 and [REDACTED]
 8 [REDACTED]
 9 (*Id.*, ex. 99). Wes Mayder [REDACTED]
 10 [REDACTED] (Gagliardi Decl., ¶ 2 and Ex. A (Wes
 11 Mayder Depo.Tr. at 124:3-18.). Yet he was unable to explain why information from a merely
 12 passive investor would be required for a seller's permit. (*Id.*, at 123:17-19.).⁴

13 **c. Wes Mayder Operated the STS, Inc. Website**

14 Wes Mayder, by his own admission, designed the STS, Inc. website. (Wes Mayder Decl.,
 15 ¶¶ 14 & 16.). But he denies that either he or his company, WeDirect, ever *hosted* a website for
 16 STS, Inc. or his brother. (*Id.*, ¶ 16).

17 Once again, the contemporaneous documentary [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 (Gagliardi Decl., ¶ 2 and Ex. A (Wes Mayder Depo.Tr. at 155:19 – 159:12 and ex. 103) (emphasis
 21 added.) The letter from Verigy alluded to by Romi Mayder was a letter dated July 9, 2007 (the
 22 previous day) from Verigy's counsel to Romi Mayder, which Romi forwarded to Wes Mayder, in
 23 which counsel stated: "Your website at www.silicontest.com shows that you and your STS
 24 Entities have been promoting products that appear to incorporate confidential technology you

25 _____
 26 ⁴ In fact, in California a driver's license is required for a sellers permit of owners or partners,
 27 officers or members of a corporate entity pursuant to the online application materials (See,
 Gagliardi Decl., ¶ 4 and Ex. C.).

1 worked on at Verigy.” (*Id.*, at 170:2-23 and ex. 104). Wes Mayder testified at his deposition that
 2 [REDACTED] (*Id.*, at 159:7-12).

3 Not only does Wes Mayder’s conduct [REDACTED] show that
 4 he was operating the website (in direct contradiction of his sworn declaration), and show therefore
 5 that he was more than a passive investor (again, in direct contradiction of his sworn declaration), it
 6 also *shows consciousness of guilt*. The email Romi Mayder sent to his brother was short on
 7 verbiage but deeply pregnant with meaning that could only have been understood by a co-
 8 conspirator. The email says, in effect, [REDACTED]
 9 In other words, “they’re on to us.” Wes Mayder willingly complied without asking questions
 10 because he knew already that the website contained Verigy trade secret information – and he knew
 11 that he, Wes Mayder, had posted it on the website that he designed and hosted. Wes Mayder was
 12 clearly a co-conspirator of his brother Romi Mayder. At the very least, a factfinder is entitled to
 13 make that determination based on the evidence at trial, thereby precluding summary judgment.

14 **d. Wes Mayder Was Involved in the Willful Backdating of Romi
 15 Mayder’s Inventor’s NoteBook.**

16 Wes Mayder also actively conspired with his brother Romi Mayder in the backdating of
 17 Romi Mayder’s inventor’s notebook – a false and fraudulent activity in direct furtherance of their
 18 conspiracy to steal Verigy’s intellectual property.

19 Wes Mayder admitted at his deposition receiving an email from his brother Romi Mayder
 20 on January 17, 2007 asking Wes Mayder to supply someone to witness entries in Romi Mayder’s
 21 inventor’s notebook and stated: [REDACTED]

22 [REDACTED] (Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at 89:1 – 91:3; 101:8 – 102:20 and
 23 ex. 7) (emphasis added).) Wes Mayder replied by email the same day, offering up his employee,
 24 Jon Davidson, without questioning the legality or ethics of the task assigned. (*Id.*) [REDACTED]

25 [REDACTED] Mayder never took issue with Romi Mayder’s *explicit request for assistance in*
 26 *falsifying records*; instead, he dutifully complied. (*Id.*)

27 And, in fact, Romi Mayder’s inventor’s notebook *was falsified* by Davidson, whose
 28 declaration and deposition testimony are at odds with each other and at odds with the

1 contemporaneous emails regarding the subject. The January 17, 2007 email string makes clear
 2 that [REDACTED]

3 [REDACTED] (See, Gagliardi Decl., ¶ 2 and A (Wes Mayder Depo.Tr. at
 4 110:6-18 (conceding this truism).) Yet, Davidson *swears* under penalty of perjury in his
 5 declaration that the request for him to do so was made *a month earlier*:

6 In *mid-December 2006*, Romi [Mayder] sent an email to Wesley [Mayder] asking
 7 about obtaining verification of dates applicable to his lab notebook. Since I had
 8 spoken several times with Romi [Mayder] about his work at STS LLC, Wesley
 9 knew that I would be a good person for Romi to be referred to. I reviewed
 Romi's notebook, and *based on my recollection of our discussions, I tried to sign*
 with *dates corresponding to approximately when we discussed the information*.
 Wesley never directed me to do anything false or anything wrongful, nor would I
 do so.

10

11 (Davidson Decl., ¶ 7) (emphasis added). Thus, Davidson *admits to backdating* Romi Mayder's
 12 inventor's notebook but vainly denies that it amounts to anything "false" or "wrongful."

13 However, in contradiction of Davidson's own declaration, Davidson swears under oath in
 14 his deposition testimony [REDACTED]

15 [REDACTED] (Gagliardi Decl., ¶ 3 and Ex. B (Davidson Depo.Tr. at 34:24 -
 16 35:14; 44:10 – 45:19).) In other words, Davidson [REDACTED]

17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]

20 [REDACTED]
 21 [REDACTED] (*Id.*, at 85:1 – 90:17 and ex. 6) (copy of the notebook).) Davidson's
 22 deposition testimony and declaration simply cannot be harmonized – one or both must be untrue
 23 on the subject of backdating the notebook, and indeed *both* are. Neither Davidson's declaration
 24 nor his deposition testimony is consistent with the definitive, contemporaneous documentary
 25 evidence that the original request for Davidson to witness and endorse the notebook was not made

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1 until January 17, 2007 and therefore Davidson simply could *not* have done so beforehand.⁵ Thus,
 2 Davidson (whose only connection to Romi Mayder is that he is Wes Mayder's employee offered
 3 up by Wes Mayder for the job of falsifying records) is utterly discredited as a witness.

4 Although it is unknown just when Davidson signed Romi Mayder's notebook, what is
 5 known is that *it had to be after* January 17, 2007 (rendering Davidson's declaration and deposition
 6 testimony utterly impossible), that it involved falsifying records, and that Wes Mayder was
 7 inextricably involved in this scheme [REDACTED]

8 [REDACTED]
 9 [REDACTED]

10 The evidence is thus *overwhelming* that Wes Mayder is thoroughly entangled with Romi
 11 Mayder's misdeeds involving the theft of Verigy's technology. Plainly, Wes Mayder was an
 12 integral part of the conspiracy with his brother Romi Mayder to tamper with evidence of the real
 13 ownership of STS, Inc's purported intellectual property. Wes Mayder's assertion that he would
 14 never do anything false or fraudulent is completely incredible in light of this evidence. Certainly,
 15 at the very least, there remain genuine issues of material fact precluding summary judgment.

16 **B. Wes Mayder is Not Entitled Summary Adjudication of Any of the Claims for
 17 Relief Against Him.**

18 The Complaint asserts 14 claims for relief. Of these, 12 are asserted against Wes Mayder:
 19 misappropriation of trade secrets, violation of the Computer Fraud and Abuse Act, 18 U.S.C. §
 20 1030, violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.*, violation
 21 of California Penal Code § 502, unfair competition in violation of California Business &
 22 Professions Code § 17200 *et seq.*, common law unfair competition, violation of the Lanham Act,
 23 15 U.S.C. § 1125(a), false advertising in violation of California Business & Professions Code §

24 _____
 25 ⁵ [REDACTED]
 26 [REDACTED]
 27 [REDACTED]

1 17500, intentional interference with prospective economic advantage, declaratory relief,
2 imposition of a constructive trust, and unjust enrichment.

3 Wes Mayder argues that “*any* legal arguments that implicate Wesley [Mayder] for *any*
4 alleged wrongdoing, including but not limited to allegations of trade secret misappropriation
5 against Wesley Mayder, are meritless.” (Motion, at p.4) (emphasis added). However, based on
6 the foregoing, exactly the opposite is true. The evidence demonstrates, as opposed to the self-
7 serving declarations concocted in support of this motion, that Wes Mayder conspired with his
8 brother Romi Mayder and is thus *legally liable for everything* Romi Mayder is liable for arising
9 out of the conspiracy. *Transgo, Inc.*, 768 F.2d at 1023; *Klistoff*, 157 Cal. App. 4th at 479.

10 Accordingly, Wes Mayder is not entitled to summary adjudication of any of the individual
11 claims asserted against him.

12 || IV. CONCLUSION

13 For the foregoing reasons, Verigy and its counsel respectfully request that the Court deny
14 in its entirety Wes Mayder's motion for summary judgment.

16 | Dated: July 17, 2008

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